STATE BAR OF CALIFORNIA
COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

MEETING SUMMARY - OPEN SESSION

Friday, July 22, 2005
(9:10 am - 5:00 pm)

Saturday, July 23, 2005
(9:15 am - 5:00 pm)

SF–State Bar Office
180 Howard Street, 4th Floor
San Francisco, CA 94105

MEMBERS PRESENT: In SF: Harry Sondeim (Chair); Linda Foy; JoElla Julien; Robert Kehr; Stanley Lamport; Kurt Melchior; Ellen Peck; Hon. Ignazio Ruvolo (Friday only); Jerry Sapiro; Sean SeLegue; Mark Tuft; Paul Vapnek; and Tony Voogd.

MEMBERS NOT PRESENT: Raul Martinez.

ALSO PRESENT: In SF: Katie Allen (State Bar Staff); Randall Difuntorum (State Bar Staff); Joseph Lundy (ALAS); Kevin Mohr (Commission Consultant); Christopher Munoz (Bar Association of San Francisco Liaison); Layla Nocks (law clerk, Cooper White Cooper); Mary Yen (State Bar Staff). In LA (by video): Diane Karpman (Beverly Hills Bar Association Liaison); and Toby Rothschild (Access to Justice Commission Liaison).

I. APPROVAL OF OPEN SESSION ACTION SUMMARY FROM THE JUNE 10, 2005

The open session summary from the June 10,. 2005 meeting was deemed approved.

II. REMARKS OF CHAIR

A. Chair's Report

The Chair reminded members to use best efforts in the timely submission of assignments, especially for 2-day meetings when it is essential for leadership and staff to assure a full agenda.

B. Staff's Report

Staff reported that Assembly Bill No. 1529, the State Bar dues bill, was passed by the Senate Judiciary Committee on June 28, 2005 and will next be considered on the Senate floor.

In addition, it was noted that Mr. Difuntorum would be on vacation for the two weeks following the meeting.

III. MATTERS FOR ACTION

A. Consideration of Rule 3-600 [ABA MR 1.13] (Organization as Client)

Mr. Lamport described the status of the proposed amended rule and summarized the concerns raised during the 10-day ballot to tentatively approve the rule. In particular, it was explained that the Commission pursued a 2-tier approach in order to clarify and enhance the accountability of organization lawyers without adopting a permissive disclosure standard. It was also explained that the current draft differs from MR 1.13 in that it covers information learned by an organization's lawyer that is not related to the subject matter of the lawyer's representation.

Staff noted the last votes taken on the rule indicating no consensus to adopt MR 1.13 due to its permissive outside reporting component and also no consensus to maintain the current version of RPC 3-600 due to the broad discretion given to organization lawyers in deciding whether to use internal up-the-ladder reporting as a response to organization misconduct.

The Chair observed that the comments received during the 10-day ballot raised drafting issues as well as policy concerns about the Commission's direction on this rule. The Chair called for a discussion of the policy decision to use a 2-tier approach. Among the points raised during the discussion were the following.

(1) Times have changed as a result of Enron and World Comm. A more prescriptive standard is needed to assure client and public protection. The wide discretion afforded by existing RPC 3-600 is not viable. The new SEC rules and MR 1.13 reflect a trend that will inevitably impact California law regardless of whether the State Bar changes the RPCs. If the MR 1.13 outside reporting standard will not be endorsed by the Commission, then some other policy must be developed that is more prescriptive than existing RPC 3-600.

(2) A 2-tier approach is inherently flawed and serves no purpose in the absence of a outside reporting component as an alternative to internal up-the-ladder reporting.

(3) As drafted, the 2-tier approach is very hard to follow and the distinction between each tier is too subtle to be appreciated by an average practitioner.

(4) Putting aside the outside reporting provision, the MR 1.13 language is not an appropriate standard because the trigger for lawyer action involves all of the following: (1) information related to the subject matter of a lawyer's representation; (2) a violation of law or breach of duty; and (3) a threat of substantial injury. The 2-tier approach developed by the codrafters is better because a violation of law that poses a risk of substantial injury is a materially different from any other situation that does not carry that risk. The 2-tier approach acknowledges this difference and gives guidance as to the required response by the organization's lawyer.

(5) An organization's lawyer, like all other lawyers, must be guided by the entirety of the RPC's and the Commission should not view the organization rule as being wholly independent from other relevant RPCs.

(6) A version of MR 1.13 that deletes the outside reporting standard but otherwise preserves the ABA approach to internal up-the-ladder reporting is a good and workable standard for California, especially if the discussion commentary is used to guide the lawyer to other applicable rules.

(7) The codrafters' 2-tier draft and MR 1.13 both contain a confusing ambiguity that should be addressed and that is the use of the word "shall" in articulating an apparent mandatory up-the-ladder standard that is actually subject to a discretionary 'escape hatch' whenever a lawyer decides that inside reporting is "not in the best interest of the client."

(8) The category of mandatory inside reporting should not include *all* violations of law, instead, substantial violations should comprise the mandatory category with other violations of law left to a lawyer's reasonable discretion.

(9) If the 2-tier structure will be abandoned then the rule must make clear that RPC 3-500 and other duties are applicable when the mandatory inside reporting is not triggered by the organization rule.

(10) As a mandatory inside reporting rule may result in discipline charges being brought against lawyers who fail to comply, the language and concept must be adequate to give clear notice to a lawyer that the reporting obligation has been triggered. An objective standard would work but a subjective standard would be problematic.

(11) One consequence of a mandatory inside reporting rule is the risk that sophisticated officers in both private and public organizations may have an incentive to marginalize the role of the organization's lawyer, in turn causing irreparable damage to the confidence and trust relationship.

(12) The organization rule calls for national uniformity as many organization clients are interstate if not international entities. Emerging MJP rules acknowledge this reality but unnecessarily provincial versions of MR 1.13 will make compliance difficult.

(13) The perception of California's rule is just as important as the reality. Any rule adopted must be credible otherwise other policy making bodies, including the federal government, will seek to regulate lawyer conduct. While politics should not invade substantive rule drafting, self regulation of the legal profession is a big picture concern requiring due consideration of public confidence in whatever substantive standards are adopted.

(14) The Commission must be careful in relying on an expectation that lawyers will read beyond the black-letter rule and appreciate the information that is relegated to the rule's discussion commentary.

(15) If the Commission elects to adopt MR 1.13(b), then the Cmt. [3] to MR 1.13 should also be adopted to clarify that the rule is not intended to endorse the concept of a lawyer substituting his or her judgment in assessing the "best interest" of an organization.

Following discussion, the Chair announced his plan to assign all members, including the codrafter team, to develop their own recommended proposal for the organization rule and

to submit drafts to staff by August 8, 2005. To guide this drafting exercise, the following consensus votes were taken.

The Commission agreed with a recommendation that the drafts implement a "1-tier" approach to mandatory inside reporting accompanied by discussion commentary addressing circumstances not falling in the category of required inside reporting. (8 yes, 2 no, 2 abstain)

The Commission disagreed with a recommendation that the drafts include MR 1.13 paragraphs (b)(1) and (b)(2). (3 yes, 8 no, 0 abstain)

The Commission agreed with a recommendation that the starting point for the drafts should be MR 1.13 (as opposed to RPC 3-600 or the codrafter's draft that was circulated for a 10-day ballot). (7 yes, 4 no, 1 abstain)

The Commission agreed with recommendation that the drafts clarify that substantial injury, standing alone, is not a trigger for mandatory inside reporting. (9 yes, 2 no, 1 abstain).

[Intended Hard Page Break]

B. Consideration of Rule 3-310 [ABA MR 1.7, 1.8, 1.9, 1.10, 1.11] Avoiding the Representation of Adverse Interests

Mr. SeLegue presented the codrafters' proposed drafts of rules 1.7, 1.8 and 1.9 with endnote issues in a memorandum to the Commission dated May 12, 2005. As indicated in the memorandum, Mr. SeLegue explained that the drafts set forth only the proposed black-letter rule text and did not include draft discussion commentary. The Chair agreed with Mr. SeLegue's suggested approach of considering the rule text and taking consensus votes to guide further drafting with the understanding that the votes would be not be final and that all matters discussed would be subject to re-voting once the codrafters add discussion commentary. Consistent with this approach, the following drafting decisions on the respective rules were made to give guidance to the codrafters.

Consideration of Proposed Rule 1.7

(1) The Commission agreed with a recommendation to include the qualifier "directly" in describing an adverse representation so long as the discussion commentary to be developed adequately gives meaning to the concept that is intended by the phrase "directly adverse." (8 yes, 2 no, 1 abstain)

(2) The Commission agreed with a recommendation that the standard set by the rule require "informed written consent" of both clients. It was understood that this vote was not intended to prejudice future consideration of concerns about differences between litigation and transactional matters. (10 yes, 0 no, 2 abstain)

(3) The Commission agreed with a recommendation that paragraph (a) of the proposed rule begin with the "signpost" title: "Representation directly adverse to current client." (11 yes, 1 no, 0 abstain) With the foregoing decisions, the Commission accepted the language of proposed rule 1.7(a) subject to further consideration when the discussion comment is added. (9 yes, 2 no, 1 abstain)

(4) The Commission agreed with a recommendation to not use a blank paragraph (b) (or a "reserved" or "not adopted" notation) simply to maintain parallelism with the structure of MR 1.7. Instead, the codrafters were asked to draft discussion commentary clarifying that the substance of MR 1.7(b) has not been adopted. (8 yes, 3 no, 1 abstain)

(5) Regarding paragraph (f), the Commission agreed with a recommendation to place all definitions temporarily in a single, standalone terminology rule and later revisit that rule to evaluate whether certain definitions are specific to a discrete rule. (7 yes, 4 no, 0 abstain) However, the Commission disagreed with a recommendation to identify all defined terms throughout the entire rules by capitalizing each instance of a defined term. (2 yes, 7 no, 1 abstain)

Consideration of Proposed Rule 1.8

As a general methodology for exploring a California counterpart to MR 1.8, the Commission determined that the topics covered by the various paragraphs of MR 1.8 would be organized under separate rule numbers (i.e., MR 1.8(a) would be numbered as rule 1.8.1 and would cover RPC 3-300). Each separate rule would be handled by an appropriate drafting team

(i.e., the RPC 3-300 team would be responsible for rule 1.8.1; in some cases a drafting team has already completed its work, in other cases a team's work is in progress, and in other cases a drafting team has not yet been formed). Consistent with this methodology, the following breakdown was outlined as the agreed upon approach.

(1) MR 1.8(a) assigned to the RPC 3-300 team
(2) MR 1.8(b) assigned to the RPC 3-100 team
(3) MR 1.8(c) assigned to the RPC 4-400 team
(4) MR 1.8(d) (including issue of a criminal defendant's literary rights) assigned to the RPC 3-300 team
(5) MR 1.8(e) assigned to the RPC 4-210 team
(6) MR 1.8(f) and (g) to be retained by the RPC 3-310 team
(7) MR 1.8(h) assigned to the RPC 3-400 team
(8) MR 1.8(i) assigned to the RPC 3-300 team
(9) MR 1.8(j) assigned to the RPC 3-120 team
(10) MR 1.8(k) to be retained by the RPC 3-310 team

In addition to above breakdown and division of the concepts covered by MR 1.8, the Commission discussed certain specific concepts. Among the points discussed were the following.

(1) Regarding 1.8(f), the sense of the Commission was to keep this rule as drafted but to make clear that the rule is triggered when one of several clients elects to pay for all of the clients.

(2) Regarding 1.8(g), the codrafters withdrew the bracketed language on pages 44-45 of the open session agenda materials. In addition, for the next draft, the codrafters will consider: (i) the issue of an advanced waiver/consent approach to satisfying the requirement that all of the jointly represented clients authorize a lawyer's acceptance of an aggregate settlement; and (ii) whether to keep the phrase "advise or advocate" in place of the MR 1.8 term "participate" and the RPC 3-310 term "enter."

(3) Regarding 1.8(k), it was understood that the concept of imputed conflicts will be raised in connection with this rule and with MR 1.10. There was no objection to a tentative drafting approach whereby each relevant drafting team assumes that imputation will be adopted, and each team considers whether, if a lawyer is personally disqualified under any of the 1.8 series of rules, the disqualification should be imputed to the members of that lawyer's firm.

Consideration of Proposed Rule 1.9

Two issues in paragraph (a) of the proposed rule were identified for discussion: use of the term "materially" to modify the term "adverse" (which is the language of MR 1.9); and use of the substantial relationship test. Regarding the first issue, there was no objection to the decision to not use the term "materially." Accordingly, the rule will not track MR 1.9 and, instead, will simply use the term "adverse."

Regarding the use of the substantial relationship test, among the points raised were the following.

(1) RPC 3-310 has been interpreted to set a standard that requires an inquiry as to whether a lawyer actually possesses confidential information. This is different from the substantial relationship test which operates through a presumption of possession of information.

(2) The substantial relationship test is not a concept designed to ascertain whether a duty has been breached, instead it is an evidentiary tool for avoiding disclosure of confidential information when proof is needed to support an assertion that such information is as risk of abuse.

(3) The ABA uses the substantial relationship test without apparent difficulty and it doesn't make sense to not subject a lawyer to discipline based on that test.

(4) The duty of confidentiality is the only duty at stake in a former client conflict rule and all other duties cease at the termination of the attorney-client relationship.

(5) In a legal malpractice case and in a disciplinary proceeding, a lawyer may use confidential information reasonably necessary to put up a defense.

(6) There is an evolved body of California case law that should not be disturbed by an attempt at codification of the substantial relationship test.

(7) In the civil arena, the emerging concept of a "continuing duty of loyalty" is problematic and this should not be imported into the rules by bringing in the substantial relationship test.

(8) The disciplinary proof standard is clear and convincing evidence and it is unclear how a substantial relationship test presumption would work in a context where privilege is waived and trial counsel has the authority to inquire into confidential information without playing the shadow game of the substantial relationship test.

(9) The common law duty of loyalty and cases concerning breach of fiduciary duty should not dictate the Commission's decision on whether to track the ABA's use of the substantial relationship test. The case law interpreting RPC 3-310 is primarily civil disqualification decisions and these case rely on the substantial relationship test.

(10) As MR 1.9 Cmt. [9] discusses "loyalty," one could construe the ABA rule as addressing the general duty of loyalty.

Following discussion, the Commission took a consensus vote and decided not to use the substantial relationship test and instead use the same language as in RPC 3-310(E) to pick up the fact that a lawyer cannot use information against current clients. (8 yes, 1 no, 0 abstain)

[Intended Hard Page Break]

C. Consideration of Rule 1-300 [ABA MR 5.5, MR 5.3] (Unauthorized Practice of Law; Multijurisdictional Practice of Law) (Including consideration of discussion section re "definition of the practice of law" and proposed rule 5.3.1 [1-311])

Matter carried over.

[Intended Hard Page Break]

D. Consideration of ABA MR 5.7. Responsibilities Regarding Law-Related Services (no California counterpart)

Matter carried over.

[Intended Hard Page Break]

E. Consideration of Rule 5.4. Professional Independence of a Lawyer (a.k.a. Rule 1-310X)

The Commission considered draft 8.1 of proposed rule 5.4 dated 7/11/05 and presented by Mr. Tuft. Mr. Tuft summarized the status of this rule and the objections received during the 10-day ballot. Attention also was directed to the Mr. Kehr's 7/16/05 e-mail message. Following discussion of the issues raised by the codrafters and in Mr. Kehr's e-mail message, the following drafting decisions were made.

(1) In paragraph (a)(3), there was no objection to changing the phrase "such plan" to "the plan."

(2) In paragraph (a) and (b), there was a consensus to change the term "entity" to "organization." (6 yes, 0 no, 3 abstain)

(3) Regarding the global issue of whether all RPC references to "entity" should be changed to "association," there was a consensus to make this global change. (5 yes, 2 no, 1 abstain)

(4) Regarding the issue of a global definition of the term "association," there was a consensus that a definition should be included in a RPC terminology section to be drafted. (8 yes, 1 no, 0 abstain) Mr. Melchior asked that his objection to this action be specified in the meeting records.

With these changes, the Chair called for a vote to tentatively approve the rule text with the understanding that discussion would next proceed on the commentary. The Commission tentatively approved the rule by a vote of 8 yes, 0 no, 0 abstaining.

Turning to the rule commentary, the Commission made the following drafting decisions.

(1) In Cmt. [7], there was a consensus to replace the term "existing" with the term "lawful." (7 yes, 1 no, 2 abstain)

(2) Regarding the citation to *Gafcon* in Cmt. [7], there was a consensus to include the cite but not include the pinpoint page reference. (6 yes, 1 no, 1 abstain)

(3) For the language preceding the *Gafcon* citation in Cmt. [7], there was a consensus to use the following sentence: "This rule is not intended to abrogate case law regarding the relationship between insurers and lawyers providing legal services to insureds." (5 yes, 1 no, 3 abstain)

(4) Regarding the reference to "domestic partner" in Cmt. [3], there was a consensus to modify that term with the word "registered" to be "registered domestic partner" as that would be consistent with the terminology used in Family Code sec. 297. (6 yes, 2 no, 1 abstain)

With the above drafting changes, the Chair requested that a vote to tentatively approve the rule and the comment be postponed until the next meeting in order to permit Mr. Rothschild an opportunity to consider the Commission's inclination to accept the codrafters' recommendation that Cmt. [8] (re inapplicability of rule 5.4 to a public agency providing legal services to a government or the public) not be included in the rule. Prior to the next meeting, the Chair asked that the codrafters contact Mr. Rothschild and also prepare a redraft of the rule incorporating the drafting changes discussed.

[Intended Hard Page Break]

F. Consideration of ABA MR 5.1. Responsibilities of Partners, Managers, and Supervisory Lawyers (previously considered as a part of rule 5.4 (aka Rule 1-310X))

The Commission considered draft 3.1 of proposed rule 5.1 dated 7/7/05 presented by Mr. Tuft. Mr. Tuft summarized the changes to the draft rule that were implemented in response to the Commission's directions given at the April 1-2, 2005 meeting. The Chair called for a vote to tentatively approve the rule text and the rule was so approved (6 yes, 1 no, 0 abstain). The Commission considered, but did not implement, the addition of the phrase "who has managerial authority" in paragraph (a) and Mr. Melchior asked that is objection specifically be noted. The Chair next called for a discussion of the draft commentary and the following drafting decisions were made.

(1) In Cmt. [1], there was a consensus to modify the last sentence to read: "Paragraphs (a), (b), and (c) of Rule 5.1 create independent bases for discipline." (7 yes, 0 no, 1 abstain)

(2) Cmt. [2] was adopted as drafted by the codrafters. (7 yes, 0 no, 1 abstain)

(3) In Cmt. [3], there was a consensus to substitute "and" for the second "that" and to strike "or designed." (8 yes, 0 no, 0 abstain)

(4) In Cmt. [6], there was a consensus to substitute "reveal" for "constitute" (5 yes, 1 no, 0 abstain)

With these changes to the commentary, the entire proposed rule was deemed tentatively approved and staff and the consultant were asked to include a notation in the web posting that the issue of "law firm discipline" was still pending consideration by the Commission.

[Intended Hard Page Break]

G. Consideration of ABA MR 5.2. Responsibilities of Subordinate Lawyer (previously considered as a part of rule 5.4 (a.k.a. Rule 1-310X))

The Commission considered draft 2.1 of proposed rule 5.2 dated 7/12/05 presented by Mr. Tuft and also an e-mail message from Mr. Kehr dated 7/16/05. Mr. Tuft summarized the changes to the draft rule noting that there were concerns raised at the April 1-2, 2005 meeting with 5.2(b) and Cmt. [2].

After initial discussion by the Commission on the first meeting day (Friday, 7/22/05), a further draft was requested and presented as draft 3 dated 7/23/05 (copy attached) by Mr. Mohr on the second meeting day (Saturday 7/23/05). The following drafting decisions were made re draft 2.1 on Friday, 7/22/05.

(1) In Cmt. [2], there was a consensus to replace the second sentence with the following: "If the question reasonably can be answered more than one way, the supervisory lawyer may assume responsibility for determining which of reasonable alternatives to select, and the subordinate may be guided accordingly." (10 yes, 0 no, 0 abstain)

(2) In 5.2(b), the Commission considered, but did not implement, a proposal to delete the word "arguable." (3 yes, 7 no, 0 abstain)

The following drafting decisions were made re draft 3 on Saturday, 7/23/05.

(1) The Commission considered, but did not implement, a proposal to delete the reference to "the State Bar Act" as paired with references to "the Rules" throughout all of proposed rule 5.2. (4 yes, 4 no, 1 abstain)

(2) There was a consensus to adopt 5.2(b) as written in draft 3. (6 yes, 2 no, 1 abstain)

(3) There was a consensus to adopt Cmt. [2] as written in draft 3. (6 yes, 0 no, 2 abstain)

(4) There was no objection to the codrafters' withdrawing Cmt. [3] and it was deemed deleted from draft 3.

With these changes, draft 3 of proposed rule 5.2 was tentatively approved by the Commission (9 yes, 0 no, 0 abstain) for web posting.

[Intended Hard Page Break]

H. Consideration of Rule 1.8.2 (Rule 3-120). Sexual Relations With Client

The Commission considered a revised draft rule 1.8.2 distributed by e-mail on July 21, 2005. Mr. Ruvolo summarized the status of this rule and the objections received during the 10-day ballot. Attention was directed to the e-mail compilation contained in the meeting materials and to Mr. Kehr's 7/16/05 e-mail message. There was a consensus to revise 1.8.2(c) to read: "Paragraphs (b)(1) and (b)(2) shall not apply to sexual relations between lawyers and their spouses or persons in an equivalent domestic relationship, or to ongoing consensual sexual relations which predate the initiation of the lawyer-client relationship." (9 yes, 1 no, 0 abstain) With this modification, proposed rule 1.8.2, as distributed on July 21st, was tentatively approved by the Commission (8 yes, 1 no, 0 abstain) for web posting.

The Chair asked staff to flag the issue of differences with Bus. & Prof. Code sec. 6106.9 for future consideration together with other statutory coordination issues. The Chair also invited Mr. Sapiro to offer a separate draft rule on the issue of a lawyer taking advantage of the attorney-client relationship to enter into a sexual relationship.

[Intended Hard Page Break]

I. Consideration of Rule 1.8.1 (Rule 3-300). Avoiding Interests Adverse to a Client

Matter not called for discussion.

[Intended Hard Page Break]

J. Report on the Board Referral of Trust and Estates Section Legislative Proposal 2005-02 (re Impaired Clients) [ABA MR 1.14].

The Commission considered a July 12, 2005 memorandum from the codrafters setting forth a first draft of a proposed rule 1.14. The memorandum also reported on a May 26, 2005 meeting held by the codrafters in order to gather information from interested persons, including representatives of the Trust & Estates Section. The Chair called for a discussion of the issues raised by the codrafters in the memorandum. Among the points raised during the discussion were the following.

(1) The threshold policy question seems to be whether there should be a rule at all on this topic.

(2) The concept of the proposed rule assumes that lawyer's have the capability to make a decision that ordinarily is entrusted to a trained physician.

(3) This rule should not be a battle between confidentiality and paternalism, instead, it should be about the lawyer's duties to carry out their scope of representation when an impairment arises. A rule like MR 1.14 should only be triggered when a lawyer's ability to carry-out their job is frustrated and the codrafters' first draft is a step in the right direction.

(4) The apparent exclusive civil orientation of the proposed rule suggests that the drafting be placed on hold until there is exploration of the criminal law implications.

(5) The implementation of the Probate Code standard for an impaired person is intended to address the concerns about a lawyer's ability to know when the rule is triggered. Lawyers are allowed to obtain expert consultation if needed to carry out their duties.

(6) The rule should be clear that the duty of confidentiality is only abrogated to the extent necessary to allow adult protective services to be alerted to a potential problem.

(7) California's existing law on attorney confidentiality does not expressly include the ABA concept of "implied authority" and paragraph (c) of the draft may need to be modified so that it does not rely on that concept.

(8) Consideration should be given to adapting RPC 3-100, Cmt. [4] (to give lawyers guidance on the broad policy considerations that are intended to be balanced by the proposed rule) and Cmt. [12] (concerning other consequences of a lawyer's disclosure of confidential information).

(9) The rule should be modified to clarify any assumptions about whether a guardian or conservator is involved when a lawyer may be required to comply with the rule.

(10) The rule should use a phrase such as "minimum disclosure" to assure that lawyers understand that disclosure of confidential information is strictly limited.

Following discussion, the Chair assigned a redraft for the next meeting. There was consensus to revise the definition of the phrase "significantly impaired capacity" to mean: "that the client suffers from an impairment of the character described in Probate code sec. 811(s) and (b)" (5 yes, 3 no, 1 abstain) and the codrafters were asked to finalize this language. In addition, it was understood that the codrafters also would address concerns expressed about the application of the rule to minors.

[Intended Hard Page Break]

K. Consideration of Rule 2-400. Prohibited Discriminatory Conduct in a Law Practice

Matter not called for discussion.

[Intended Hard Page Break]

L. Consideration of Rule 3-400 [ABA MR 1.8(h) & MR 1.2(c)] Limiting Liability to Client

The Commission considered a July 11, 2005 memorandum setting forth rule amendment issues identified by the codrafters on RPC 3-400. Mr. Vapnek summarized the codrafters' issues outline indicating that the codrafters recommend no change to that part of the rule categorically prohibiting prospective limitations on malpractice liability as that view is in accord with the Restatement. The following drafting decisions were made to guide the codrafters on preparing a first draft of a proposed amended rule.

(1) Although a departure from the ABA, there was a consensus to retain RPC 3-400's categorical prohibition on prospective limitations consistent with the view of the Restatement. (7 yes, 0 no, 0 abstain)

(2) There was a consensus to follow the ABA and to expand RPC 3-400(b), regarding settlement of a malpractice claim, to cover "former clients" as well as "current clients." (6 yes, 0 no, 1 abstain)

(3) There was a consensus to retain the RPC 3-400 requirement that a lawyer inform a client in writing of the advisability to seek independent counsel on a malpractice settlement. (5 yes, 0 no, 1 abstain)

(4) There was a consensus to reject the Restatement approach re "improper pressures" as that reflected a civil enforcement standard rather than a lawyer disciplinary standard. (5 yes, 0 no, 1 abstain) In addition, it was indicated that the concept of moral turpitude precludes a lawyer's deceptive and fraudulent conduct.

(5) There was a consensus to reject the Restatement view that a settlement must be "fair and reasonable" as that again was a civil enforcement concept. (5 yes, 1 no, 0 abstain)

The Chair assigned a redraft incorporating the above decisions.

[Intended Hard Page Break]

M. Consideration of Rule 3-500 [ABA MR 1.4] Communication

Matter not called for discussion.

[Intended Hard Page Break]

N. Consideration of Rule 3-510 [ABA MR 1.2(a)] Communication of Settlement Offer

Matter not called for discussion.

[Intended Hard Page Break]

O. Consideration of ABA MR 3.2. Expediting Litigation

The Commission considered a July 7, 2005 memorandum presented by Mr. Voogd setting forth a recommendation accounting for both MR 3.2 and MR 1.3 (re diligence). Mr. Voogd summarized the memorandum indicating that, as an alternative to the adoption of MR 3.2, MR 1.3 could be amended to prohibit a lawyer from seeking or granting an extension of time without a client's informed written consent. The Chair called for a discussion of the concept of MR 3.2, noting that consideration of MR 1.3 would be agendized for future consideration.

(1) The generality of the MR 3.2 standard is not an effective disciplinary rule.

(2) The structure of the ABA MR's must be appreciated and the Commission should not consider the merits of MR 3.2 in isolation.

(3) The broad policy underlying MR 3.2 appears to be a lawyer civility and administration of justice concern.

(4) MR 3.2 is a major departure from California's approach to issues of lawyer neglect as the current law focuses on discrete enforceable areas: delay for a lawyer's benefit; delay to cause injury; and habitual neglect that impacts the efficiency of the court system.

(5) MR 3.2 is the wrong rule to address lawyer civility.

(6) MR 3.2 is founded on a "reasonableness" standard that may be okay for civil issues concerning a lawyer's standard of care but is not right for a disciplinary rule.

Following discussion, the Chair took a vote to ascertain Commission consensus on the policy of MR 3.2. The Commission adopted the concept of MR 3.2 by a vote of 7 yes, 5 no, 1 abstain. The Chair assigned the codrafters to prepare a first draft rule and all members were invited to send drafting suggestions to the codrafters.

[Intended Hard Page Break]

P. Consideration of Rule 2-300 [ABA MR 1.17] Sale or Purchase of a Law Practice of a Member, Living or Deceased

The Commission considered a July 7, 2005 memorandum including a proposed amended rule 2-300, incorporating revisions discussed at the Commission's June 10, 2005 meeting. Mr. Sapiro presented the drafting issues footnoted in the memorandum. In particular, regarding paragraph (b), there was a consensus to depart from the current standard prohibiting an increase in fees "solely" by reason of a sale of a law practice and to implement the standard found in Florida's comparable rule requiring that fee agreements be honored by purchasers. (10 yes, 2 no, 0 abstain) The codrafters were authorized to draft language to adapt this Florida approach. The Chair took the following straw votes on key policy issues to guide the codrafters' preparation of the next draft.

(1) Permit the sale of a geographic area of practice? Approved (7 yes, 5 no, 0 abstain).

(2) Permit the sale of a substantive area of practice? Approved (8 yes, 3 no, 1 abstain).

(3) Permit a return to practice in a substantive area? Approved (6 yes, 2 no, 3 abstain).

(4) Permit a return to practice in a substantive area but only where there is compliance with certain conditions to be determined? Approved (9 yes, 2 no, 0 abstain).

(5) Permit a return to practice in a geographic area but only where there is compliance with certain conditions to be determined? Disapproved (4 yes, 6 no, 1 abstain).

(6) Permit a return to practice in a geographic area? Disapproved (2 yes, 8 no, 0 abstain)

In discussing the results of the straw votes, there were concerns expressed about the commercialization of the practice of law, a large firm v. small firm bias, a departure from the original intent of RPC 2-300 to allow solos to benefit from the sale of goodwill, freedom of contract between a buyer and seller, and improper anti-competitive regulation.

The Chair asked the codrafters to consider all of the concerns expressed in developing a next draft that implements the Commission's policy decisions.

[Intended Hard Page Break]

Q. Consideration of Rule 3-700 [ABA MR 1.16)] Termination of Employment

Matter not called for discussion.

[Intended Hard Page Break]

R. Consideration of Rule 4-100 [ABA MR 1.15)] Preserving Identity of Funds and Property of a Client

Matter not called for discussion.

[Intended Hard Page Break]